Alvin Leong Wai Kuan & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan and other applications

HIGH COURT (SHAH ALAM) — JUDICIAL REVIEW APPLICATION NOS BA-25–52–08 OF 2018, BA-25–56–09 OF 2018 AND BA-25–72–11 OF 2018
WONG KIAN KHEONG J
20 MARCH 2020

Administrative Law — Judicial review — Application for — Review of decision of first respondent allowing third respondent's appeal for extension of period for delivery of vacant possession — Whether court had judicial power to review the first respondent's decision — Whether the Federal Court's judgment in Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281 had retrospective or prospective effect — Whether second respondent could extend period — Whether first respondent's decision was valid — Whether third respondent could rely on s 2(2) of Housing Development (Control and Licensing) Act 1966 — Whether applicants entitled to claim for liquidated and ascertained damages

Constitutional Law — Courts — Judicial power — First respondent allowed third respondent's appeal for extension of period for delivery of vacant possession — Whether court had judicial power to review the first respondent's decision — Federal Constitution art 121(1) — Housing Development (Control and Licensing) Act 1966 ss 24(1) & (2)(a)–(j) — Housing Development (Control and Licensing) Regulations 1989 reg 12

Land Law — Vacant possession — Delivery of — Extension of period — First respondent allowed third respondent's appeal for extension of period for delivery of vacant possession — Whether second respondent could extend period — Whether first respondent's decision was valid — Whether applicants entitled to claim for liquidated and ascertained damages

The applicants in these three judicial review applications ('the three applications') had purchased 'service apartments' ('the parcels') in 'Dreamcity Residence' ('the building'). The applicants and the developer of the building ('the third respondent') had entered into sale and purchase agreements regarding the parcels ('the SPA's'). The SPA provided that the third respondent shall deliver vacant possession of the parcel to the applicants within 42 calendar months from the date of the SPA. The third respondent sent a letter to the controller of housing ('the second respondent') and applied to extend the 42

months period to a period of 59 months. The second respondent partially allowed the third respondent's application and extended the 42 months period to a period of 54 months ('the second respondent's decision'). The third respondent appealed to the Minister of Housing and Local Government ('the first respondent') against the second respondent's decision. The first respondent allowed the third respondent's appeal and extended the 42 months period to a period of 59 months ('the first respondent's decision'). These three applications sought the following relief, among others, against the first, second and third respondents: (a) an order of certiorari to quash the first respondent's decision; and (b) a declaration that: (i) the first respondent's decision was void under the Housing Development (Control and Licensing) Act 1966 ('HDA'); (ii) reg 11(3) of the Housing Development (Control and Licensing) Regulations 1989 (HDR) was ultra vires HDA and was void; and (iii) the applicants had a right to claim for liquidated and ascertained damages ('LAD') pursuant to the SPA from the third respondent. The issues for consideration were (1) whether the court had the judicial power to review the first respondent's decision; (2) whether the Federal Court's judgment in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 ('Ang Ming Lee') had retrospective or prospective effect; (3) whether the second respondent could extend the 36 months period; (4) whether the first respondent's decision was valid; (5) whether the third respondent could rely on s 2(2) of the HDA; and (6) whether the applicants were entitled to claim for LAD.

Held:

(1) Regulation 12 of the HDR which stated that the 'decision of the Minister ... shall be final and shall not be questioned in any court' ('the impugned part') had ousted the court's judicial power under art 121(1) of the Federal Constitution ('FC') to review the validity of any decision of the Minister on appeal to the Minister against a decision of the Controller of Housing made pursuant to regs 3(3), 4(1), 5(4), 9(2) and 11(3) of the HDR. The impugned part was invalid pursuant to art 4(1) of the FC only to the extent of the inconsistency with art 121(1) of the FC. Consequently, the court had the judicial power under art 121(1) of the FC to decide these three applications regarding the validity of the first respondent's decision. The impugned part also deprived the applicants of their fundamental right of access to justice as guaranteed by art 5(1) of the FC. Sections 24(1) and (2)(a)–(j) of the HDA did not expressly empower the first respondent to make a subsidiary legislation which ousted the court's jurisdiction to decide any decision of the first respondent. The court was also unable to find that by necessary implication, s 24(1) and (2)(a)–(j) of the HDA enabled the first respondent to make the impugned part. Furthermore, in providing for s 24(1) and (2)(a)–(j) of the HDA, it was inconceivable for Parliament to

have intended for the first respondent to make delegated legislation which encroached into the court's judicial power enshrined in art 121(1) of the FC. Accordingly, both literal and purposive interpretations of s 24(1) and (2)(a)–(j) of the HDA did not enable the first respondent to make the impugned part in reg 12 of the HDR. As such, the impugned part was ultra vires s 24(1) and (2)(a)–(j) of the HDA and void under s 23(1) of the Interpretation Acts 1948 and 1967 (see paras 22–23 & 25).

(2) The Federal Court in *Ang Ming Lee* had not expressly ruled that its decision could only have prospective effect. Hence, in accordance with the general rule, the judgment in *Ang Ming Lee* had retrospective effect and applied to these three applications. There were no exceptional circumstances for the doctrine of prospective overruling to apply to the decision in *Ang Ming Lee*. On the contrary, the object of HDA and HDR was to protect a 'homebuyer' as defined in s 16A of the HDA. Accordingly, in line with the purpose of HDA and HDR, it was in the interest of homebuyers for the judgment in *Ang Ming Lee* to be given retrospective effect (see para 29).

(3) Regulation 11(3) of the HDR was invalid and the second respondent could not therefore exercise any power under reg 11(3) of the HDR to extend the 36 months period. In addition, reg 11(3) of the HDR could not be an exception to the SPA prescribed in reg 11(1) of the HDR ('the statutory SPA'). There was nothing in reg 11(3) of the HDR which provided that it shall override the statutory SPA as prescribed mandatorily by reg 11(1) of the HDR. Accordingly, the second respondent could not invoke reg 11(3) of the HDR to 'waive or modify' the 36 months period in the statutory SPA (see paras 30–31).

(4) There was nothing in the HDR which empowered the first respondent to extend the 36 months period in the statutory SPA. Accordingly, there was no lawful basis to make the first respondent's decision and the first respondent's decision constituted an illegality. Even if the first respondent had the power under the HDR to extend the 36 months period, the first respondent should had given all purchasers of the parcels in the building a right to be heard before making the first respondent's decision. Hence, there was procedural impropriety when the first respondent's decision was made. In view of the illegality and procedural impropriety, the court had no hesitation to exercise its discretion to issue a certiorari order to quash the first respondent's decision (see paras 35–36).

(5) The third respondent submitted that if the court quashed the first respondent's decision, the court should remit the question of extending the 36 months period to the first respondent under s 2(2) of the HDA ('the remittance order'). The court was unable to make the remittance order as the first respondent did not make any application for the

remittance order and secondly, the two conditions of s 44(1) of the Specific Relief Act 1950 was not satisfied (see paras 37–38).

(6) The applicants were entitled to claim LAD based on the 36 months period. By reason of reg 11(1) of the HDR, the 36 months period had been prescribed mandatorily in the statutory SPA. If the applicants were not entitled to claim LAD premised on the 36 months period, the mandatory effect of reg 11(1) of the HDR would be circumvented. The object of the HDA and HDR was to protect homebuyers. One manner to achieve this object was to ensure that the terms and conditions of the SPA was not drafted in a lopsided manner which favoured unjustly housing developers at the expense of homebuyers. Hence, the statutory SPA was provided in reg 11(1) of the HDR. If the declaration was not granted, the object of the HDA and HDR would be defeated (see para 41).

[Bahasa Malaysia summary

Pemohon dalam ketiga-tiga permohonan semakan kehakiman ini ('ketiga-tiga permohonan') telah membeli 'apartmen servis' ('petak') di 'Dreamcity Residence' ('bangunan'). Pemohon dan pemaju bangunan ('responden ketiga') telah membuat perjanjian jual beli mengenai petak ('SPA'). SPA menyatakan bahawa responden ketiga harus menyerahkan petak kosong kepada pemohon dalam masa 42 bulan kalendar dari tarikh SPA. Responden ketiga mengirim satu surat kepada Pengawal Perumahan ('responden kedua') dan memohon untuk melanjutkan tempoh 42 bulan hingga 59 bulan. Responden kedua membenarkan sebahagian permohonan responden ketiga dan melanjutkan tempoh 42 bulan hingga 54 bulan ('keputusan responden kedua'). Responden ketiga mengemukakan rayuan kepada Menteri Perumahan dan Kerajaan Tempatan ('responden pertama') terhadap keputusan responden kedua. Responden pertama membenarkan rayuan responden ketiga dan melanjutkan tempoh 42 bulan hingga 59 bulan ('keputusan responden pertama'). Ketiga-tiga permohonan ini meminta relif berikut, antara lain, terhadap responden pertama, kedua dan ketiga: (a) perintah certiorari untuk membatalkan keputusan responden pertama; dan (b) perisytiharan bahawa: (i) keputusan responden pertama adalah tidak sah di bawah Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('HDA'); (ii) peraturan 11(3) Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 (HDR) adalah ultra vires HDA dan tidak sah; dan (ii) pemohon mempunyai hak untuk menuntut ganti rugi jumlah tertentu dan ditentukan ('LAD') menurut SPA daripada responden ketiga. Isu-isu untuk pertimbangan adalah: (1) sama ada mahkamah mempunyai kuasa kehakiman untuk mengkaji keputusan responden pertama; (2) sama ada keputusan Mahkamah Persekutuan di *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar & Anor and another appeal* [2020] 1 MLJ 281 ('Ang Ming Lee') mempunyai kesan retrospektif atau prospektif; (3) sama ada responden kedua dapat melanjutkan tempoh 36 bulan; (4) sama ada keputusan responden pertama adalah sah;

(5) sama ada responden ketiga boleh bergantung pada s 2(2) HDA; dan (6) sama ada pemohon berhak menuntut LAD.

Diputuskan:

(1) Peraturan 12 HDR yang menyatakan bahawa 'keputusan Menteri ... adalah muktamad dan tidak boleh dipersoalkan dalam mana-mana mahkamah' ('bahagian yang dipersoalkan') telah menyingkirkan kuasa kehakiman mahkamah berdasarkan Perkara 121(1) Perlembagaan Persekutuan ('PP') untuk mengkaji semula kesahan mana-mana keputusan Menteri mengenai rayuan kepada Menteri terhadap keputusan Pengawal Perumahan yang dibuat berdasarkan peraturan 3(3), 4(1), 5(4), 9(2) dan 10(3) HDR. Bahagian yang dipersoalkan tidak sah berdasarkan perkara 4(1) PP hanya setakat ketidakselarasan dengan perkara 121(1) PP. Akibatnya, mahkamah memiliki kuasa kehakiman berdasarkan perkara 121(1) PP untuk memutuskan ketiga-tiga permohonan ini mengenai kesahan keputusan responden pertama. Bahagian yang dipersoalkan juga melarang pemohon hak asasi mereka untuk mendapatkan keadilan seperti yang dijamin oleh perkara 5(1) PP. Seksyen 24(1) dan (2)(a)–(j) HDA tidak secara khusus memberi kuasa kepada responden pertama untuk membuat perundangan tambahan yang menyingkirkan bidang kuasa mahkamah untuk memutuskan keputusan mana-mana responden pertama. Mahkamah juga tidak dapat memutuskan bahawa dengan implikasi yang diperlukan, s 24(1) dan (2)(a)–(j) HDA membolehkan responden pertama membuat bahagian yang dipersoalkan. Tambahan lagi, dalam memperuntukkan s 24(1) dan (2)(a)–(j) HDA, tidak dapat dibayangkan bagi Parlimen yang bermaksud untuk responden pertama membuat perundangan yang didelegasikan yang melanggar kuasa kehakiman mahkamah yang termaktub dalam perkara 121(1) PP. Oleh itu, kedua-dua tafsiran literal dan bertujuan s 24(1) dan (2)(a)–(j) HDA tidak memungkinkan responden pertama membuat bahagian yang dipersoalkan dalam peraturan 12 HDR. Oleh yang demikian, bahagian yang dipersoalkan adalah ultra vires s 24(1) dan (2)(a)–(j) HDA dan batal di bawah s 23(1) Akta Tafsiran 1948 dan 1967 (lihat perenggan 22–23 & 25).

(2) Mahkamah Persekutuan di *Ang Ming Lee* tidak secara khusus memutuskan bahawa keputusannya hanya dapat memberi kesan prospektif. Oleh itu, sesuai dengan peraturan umum, keputusan dalam *Ang Ming Lee* mempunyai kesan retrospektif dan diterapkan pada ketiga-tiga permohonan ini. Tidak ada keadaan yang luar biasa bagi doktrin prospektif untuk digunapakai pada keputusan di *Ang Ming Lee*. Sebaliknya, objektif HDA dan HDR adalah untuk melindungi 'pembeli rumah' seperti yang ditentukan dalam s 16A HDA. Oleh itu, sesuai dengan tujuan HDA dan HDR, adalah kepentingan pembeli rumah agar

keputusan di *Ang Ming Lee* diberikan kesan retrospektif (lihat perenggan 29).

(3) Peraturan 11(3) HDR adalah tidak sah dan oleh itu responden kedua tidak dapat menggunakan kuasa apa pun berdasarkan peraturan 11(3) HDR untuk melanjutkan jangka masa 36 bulan. Selain itu, peraturan 11(3) HDR tidak dapat menjadi pengecualian untuk SPA yang ditentukan dalam peraturan 11(1) HDR ('SPA berkanun'). Tidak ada apa-apa dalam peraturan 11(3) HDR yang menetapkan bahawa ia akan menggantikan SPA berkanun seperti yang ditetapkan mandatori oleh peraturan 11(1) HDR. Oleh itu, responden kedua tidak dapat membangkitkan peraturan 11(3) HDR untuk 'mengetepikan atau mengubah' tempoh 36 bulan dalam SPA berkanun (lihat perenggan 30–31).

(4) Tiada apa-apa dalam HDR yang memberi kuasa kepada responden pertama untuk melanjutkan tempoh 36 bulan di SPA berkanun. Oleh itu, tidak ada asas yang sah untuk membuat keputusan responden pertama dan keputusan responden pertama adalah tidak sah. Walaupun responden pertama mempunyai kuasa di bawah HDR untuk melanjutkan jangka masa 36 bulan, responden pertama harus memberi hak kepada semua pembeli petak di bangunan untuk didengar sebelum membuat keputusan responden pertama. Oleh itu, terdapat ketidakaturan prosedur ketika keputusan responden pertama dibuat. Memandangkan terdapat kesalahan dan ketidakaturan prosedur, mahkamah tidak ragu-ragu untuk menggunakan budi bicara untuk mengeluarkan perintah certiorari untuk membatalkan keputusan responden pertama (lihat perenggan 35–36).

(5) Responden ketiga mengemukakan bahawa jika mahkamah membatalkan keputusan responden pertama, mahkamah harus mengajukan pertanyaan untuk melanjutkan tempoh 36 bulan kepada responden pertama di bawah s 2(2) HDA ('perintah penyelesaian'). Mahkamah tidak dapat membuat perintah penyelesaian kerana responden pertama tidak membuat permohonan perintah penyelesaian dan kedua, kedua-dua syarat s 44(1) Akta Relief Spesifik 1950 tidak dipenuhi (lihat perenggan 37–38).

(6) Pemohon berhak menuntut LAD berdasarkan tempoh 36 bulan. Berdasarkan peraturan 11(1) HDR, tempoh 36 bulan telah ditetapkan secara mandatori dalam SPA berkanun. Sekiranya pemohon tidak berhak untuk menuntut LAD yang ditetapkan pada jangka masa 36 bulan, kesan mandatori dari peraturan 11(1) HDR akan dielakkan. Objektif HDA dan HDR adalah untuk melindungi pembeli rumah. Salah satu cara untuk mencapai objektif ini adalah memastikan bahawa terma dan syarat SPA tidak digubal secara sepihak yang memihak kepada pemaju perumahan yang tidak adil dengan perbelanjaan pembeli rumah. Oleh

itu, SPA berkanun disediakan dalam peraturan 11(1) HDR. Sekiranya perisytiharan tidak diberikan, objektif HDA dan HDR akan dikalahkan (lihat perenggan 41).]

Cases referred to

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (refd)
Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281; [2020] 1 CLJ 162, FC (refd)
Bank Kerjasama Rakyat Malaysia Bhd v Koperasi Amanah Pelaburan Bhd [2019] MLJU 754, HC (refd)
Barisan Arena Sdn Bhd v Perbadanan Prima Malaysia [2019] MLJU 1166; [2019] 7 AMR 139, HC (refd)
Birmingham City Corporation v West Midland Baptist (Trust) Association (Incorporated) [1969] 3 All ER 172, HL (refd)
Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)
Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641, FC (refd)
Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar [2020] 1 MLJ 141; [2020] 1 CLJ 1, FC (refd)
Public Prosecutor v Dato' Yap Peng [1987] 2 MLJ 311, SC (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 5 AMR 497, FC (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333; [2010] 3 CLJ 507, FC (refd)
Spectrum Plus Ltd, Re; National Westminster Bank plc v Spectrum Plus Ltd and others [2005] 4 All ER 209, HL (refd)
Sri Damansara Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Ors [2020] MLJU 170, HC (refd)
Tan Kang Hai v Slimming Sanctuary Sdn Bhd [2016] MLJU 973; [2016] 5 MLRH 651, HC (refd)

Legislation referred to

Acquisition of Land (Assessment of Compensation) Act 1919 [UK]
Criminal Procedure Code s 418A
Federal Constitution 4(1), 5(1), 121(1), 160(2)
Housing Development (Control and Licensing) Act 1966 ss 2(2), 16A, 24(1), (2)(a), (2)(b), (2)(c), (2)(d), (2)(e), (2)(f), (2)(g), (2)(h), (2)(i), (2)(j)
Housing Development (Control and Licensing) Regulations 1989 regs 3(3),

4(1), 5(4), 9(2), 11(1), (1A), (1B), 11(3), 12, Schedule H
Interpretation Acts 1948 and 1967 ss 2(1)(e), 3, 3(b), 23(1), Part 1
Perumahan Rakyat 1Malaysia Act 2012 s 73(b)
Revision of Laws Act 1968
Rules of Court 2012 O 15 r 16
Specific Relief Act 1950 ss 41, 44(1), (1)(a), (1)(b), (1)(c), (1)(d), (1)(e)

Samreet Singh (Yong Wei Seng with him) (WS Yong & Co) in the first application for the applicants.
Frank Loh Chun Hoo (Siti Syafiqah Sofia bt Mohd Saufi with him) (Chui, Yap & Co) in the second application for the applicants.
Godfrey Thomas Fernandez (GT Fernandez & Co) in the third application for the applicants.
Liew Horng Bin (Senior Federal Counsel, Attorney General's Chambers) for the first and second respondents.
Rajasegaran a/l Karruppiah (Kalvinder Singh Bath with him) (A Rahim & Co) for the third respondents.

Wong Kian Kheong J:

A. INTRODUCTION

[1] The applicants ('applicants') in these three judicial review applications ('three applications') have purchased 'service apartments' ('parcels') i'n 'Dreamcity Residence', Mines Resort City, Seri Kembangan, Selangor Darul Ehsan ('building').

[2] The respondents in these three applications are as follows:

(a) the first respondent ('first respondent') is the Minister of Housing and Local Government;

(b) the controller of housing is the second respondent ('second respondent'); and

(c) the third respondent ('third respondent') is the developer of the building.

[3] The applicants and third respondent have entered into sale and purchase agreements regarding the parcels ('SPA's').

[4] Clause 25(1) of the SPA ('cl 25(1)') provides that the third respondent shall deliver vacant possession of the parcel to the applicants within 42 calendar months from the date of the SPA ('42 months period').

[5] The third respondent sent a letter dated 7 September 2016 to the second respondent and applied to extend the 42 months period to a period of 59

months ('third respondent's application').

[6] In a letter dated 17 October 2016 ('second respondent's decision'), the second respondent partially allowed the third respondent's application and extended the 42 months period to a period of 54 months ('54 months period').

[7] The third respondent appealed to the first respondent against the second respondent's decision by way of a letter dated 21 October 2016 ('third respondent's appeal').

[8] The first respondent sent a letter dated 19 October 2017 to the third respondent ('first respondent's decision') which allowed the third respondent's appeal and extended the 42 months period to a period of 59 months ('59 months period').

B. THREE APPLICATIONS

[9] These three applications seek the following relief, among others, against the first, second and third respondents (collectively the 'respondents'):

(a) an order of certiorari to quash the respondent's decision; and

(b) a declaration that:

(i) the first respondent's decision is void under the Housing Development (Control and Licensing) Act 1966 ('the HDA');

(ii) reg 11(3) of the Housing Development (Control and Licensing) Regulations 1989 ('the HDR') is ultra vires HDA and is void; and

(iii) the applicants have a right to claim for liquidated and ascertained damages ('LAD') pursuant to the SPA from the respondent.

[10] Vazeer Alam bin Mydin Meera J (as he then was) granted leave for the applicants to proceed with the three applications.

[11] When I perused the cause papers regarding the three applications, I noticed that the 42 months period might be inconsistent with cl 25(1) of Schedule H to HDR ('Schedule H') (which provides for developers to deliver vacant possession of parcels to their purchasers within 36 calendar months from the date of the sale and purchase agreements ('36 months period')). Consequently, I informed learned counsel for the applicants and respondents that cl 25(1) might be inconsistent with Schedule H ('inconsistency'). I then gave the applicants and respondents a right to file further affidavits and supplemental written submission regarding the effect of the inconsistency (if any) on the three applications. I have taken the above course of action because

all the parties in the three applications have a right under the second rule of natural justice to be heard before this court decides on the effect of the inconsistency (if any) which is raised by the court (not by the parties) — please see *Tan Kang Hai v Slimming Sanctuary Sdn Bhd* [2016] MLJU 973; [2016] 5 MLRH 651 at para [11](2).

C. ISSUES

[12] The following questions arise in these three applications:

(a) whether the court has judicial power to review the first respondent's decision notwithstanding that reg 12 of the HDR has expressly provided that the first respondent's decision 'shall be final and shall not be questioned in any court'. This novel issue concerns the application of:

(i) the supremacy of the Federal Constitution ('the FC') as enshrined in art 4(1) of the FC;

(ii) the doctrine of basic structure of the FC;

(iii) the doctrine of separation of powers and the court's exclusive judicial power as laid down in art 121(1) of the FC;

(iv) a person's fundamental right of access to justice as guaranteed in art 5(1) of the FC; and

(v) the first respondent's statutory power to make HDR under s 24(1) and (2)(a)–(j) HDA and the doctrine of ultra vires regarding subsidiary legislation as embodied in s 23(1) of the Interpretation Acts 1948 and 1967 ('the IA');

(b) does the recent Federal Court's judgment in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162 have retrospective or prospective effect? In this regard, when can a Malaysian court apply the doctrine of prospective overruling (where the court's judgment or order can only have prospective effect)?

(c) if *Ang Ming Lee* has retrospective effect:

(i) can the respondent lawfully extend pursuant to reg 11(3) of the HDR the 36 months period, first to 42 months period and then to 54 months period? and

(ii) whether the respondent's decision is valid, third especially when the applicants have been deprived of their right to be heard before the making of the second respondent's decision;

(d) whether the first respondent's decision is valid:

(i) in view of reg 11(1), (1A) and (1B) of the HDR; and

(ii) when the applicants could not exercise their right to be heard before the first respondent's decision was made.

There is no previous Malaysian case which has decided on the validity of the first respondent's decision to extend a time period provided in the SPA;

(e) if the court quashes the first respondent's decision by way of a certiorari order, can the court remit the issue of extending the 36 months period to the first respondent under s 2(2) of the HDA? This issue concerns the application of s 44(1) of the Specific Relief Act 1950 ('the SRA'); and

(f) are the applicants entitled to claim LAD from the third respondent based on the 36 months period?

D. DOES REG 12 OF THE HDR BAR THE COURT'S JUDICIAL POWER TO REVIEW THE FIRST RESPONDENT'S DECISION?

[13] Regulation 12 of the HDR states as follows:

Appeal

Notwithstanding anything to the contrary in these Regulations, any person aggrieved by the decision of the Controller under paragraph (3) of regulation 3, paragraph (1) of regulation 4, paragraph (4) of regulation 5, paragraph (2) of regulation 9 or *paragraph (3) of regulation 11 may, within fourteen (14) days after having been notified of the decision of the Controller, appeal against such decision to the Minister; and the decision of the Minister made thereon shall be final and shall not be questioned in any court*. (Emphasis added.)

[14] The question that arises is whether reg 12 of the HDR can oust the court's judicial power under art 121(1) of the FC to review the first respondent's decision.

[15] Article 4(1) of the FC reads as follows:

4 Supreme law of the Federation

(1) *This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void*. (Emphasis added.)

Article 4(1) of the FC provides for the supremacy of FC as explained by Suffian LP (sitting alone) in the Federal Court case of *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 at p 113, as follows:

The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is

limited by the Constitution, and they cannot make any law they please. (Emphasis added.)

[16] The term 'law' in art 4(1) of the FC has been defined in art 160(2) of the FC as follows:

'law' includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof; (Emphasis added.)

[17] Section 3 of the IA has defined 'written law' as follows:

'written law' means —

(a) ...;

(b) *Acts of Parliament and subsidiary legislation made thereunder*; ... (Emphasis added.)

[18] By reason of the definitions of 'law' (in art 160(2) of the FC) and '*written law*' (in s 3(b) of the IA), the doctrine of supremacy of FC (as embodied in art 4(1) of the FC) requires all subsidiary legislation made under all Acts of Parliament to be consistent with the FC (the supreme law of the country). Accordingly, by virtue of art 4(1) of the FC, any delegated legislation which is inconsistent with FC 'shall, to the extent of the inconsistency, be void'.

[19] The following two judgments of the Federal Court, both delivered by Zainun Ali FCJ, have held that the basic structure of FC includes the doctrine of separation of powers and the court's exclusive judicial power to decide disputes under art 121(1) of the FC:

(a) *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; and

(b) *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545.

[20] It is decided in *Bank Kerjasama Rakyat Malaysia Bhd v Koperasi Amanah Pelaburan Bhd* [2019] MLJU 754 at paras [34] and [35], as follows:

[34] As explained above, there are conflicting decisions of our apex court on the application of the basic structure doctrine. On the one hand, the Federal Court in *Kok Wah Kuan* has rejected the basic structure doctrine. On the other hand, there is a trilogy of Federal Court judgments in *Sivarasa*, *Semenyih Jaya* and *Indira Gandhi which has applied the Basic Structure Doctrine.*

[35] *In the Federal Court case of Dalip Bhagwan Singh v Public Prosecutor [1998] 1 MLJ 1, at 14, Peh Swee Chin FCJ has held that when there are conflicting decisions of the Federal Court, the subsequent Federal Court decision should prevail over the earlier*

Federal Court decision. This is the first reason for me to adopt the approach expounded by the later Federal Court cases of Sivarasa, Semenyih Jaya and Indira Gandhi. There is a second reason for me to apply the later approach decided by the Federal Court — I am attracted to the reasoning regarding the basic structure doctrine which upholds the Rule of Law and protects fundamental liberties. (Emphasis added.)

[21] Section 73(b) of the Perumahan Rakyat 1Malaysia Act 2012 ('the PRIMA') provides that no 'action, suit, prosecution or other proceedings shall lie or be brought, instituted or maintained in any court' against Perbadanan Prima Malaysia, a statutory body established under PRIMA. In *Barisan Arena Sdn Bhd v Perbadanan Prima Malaysia* [2019] MLJU 1166; [2019] 7 AMR 139 at para [22], I have followed *Semenyih Jaya* and *Indira Gandhi* as follows:

> [22] *If s 73(b) of the PR1MA excludes the court's jurisdiction from deciding this Action*:
>
> (1) *ss 73(b) of the PR1MA has altered the basic structure of the Constitution regarding the court's exclusive judicial power to decide disputes under art 121(1) of the Constitution (alteration)*;
>
> (2) *the alteration has encroached into the exclusive domain of the court's judicial power*;
>
> (3) *ss 73(b) of the PR1MA is invalid under art 4(1) of the Constitution to the extent of the Alteration*; and
>
> (4) *in view of the aforesaid invalidity of ss 73(b) of the PR1MA, the court has jurisdiction to determine this action.*

[22] Based on *Semenyih Jaya* and *Indira Gandhi* I am of the following view regarding the part of reg 12 which states that the 'decision of the Minister ... shall be final and shall not be questioned in any court' ('impugned part'):

(a) the impugned part has ousted the court's judicial power under art 121(1) of the FC to review the validity of any decision of the Minister on appeal to the Minister against a decision of the controller of housing made pursuant to regs 3(3), 4(1), 5(4), 9(2), and 11(3) of the HDR;

(b) the impugned part has altered the basic structure of FC regarding the doctrine of separation of powers between the executive, legislature and judiciary ('alteration') by encroaching into the exclusive domain of the court's judicial power under art 121(1) of the FC; and

(c) the impugned part is invalid pursuant to art 4(1) of the FC only to the extent of the alteration (inconsistency with art 121(1) of the FC). Consequently, the court has the judicial power under art 121(1) of the FC to decide these three applications regarding the validity of the first respondent's decision.

[23] There is a second reason for invalidating the impugned part. The

impugned part deprives the applicants of their fundamental right of access to justice ('fundamental access to justice') as guaranteed by art 5(1) of the FC. Article 5(1) of the FC provides that no person shall be deprived of his or her life or personal liberty save in accordance with law. In the Federal Court case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507 at para [4], Gopal Sri Ram FCJ has explained fundamental access to justice in art 5(1) of the FC as follows:

> [4] *Article 5(1)* may be selected to illustrate the point that is sought to be made since it is one of the provisions relied on in this case. *That article proscribes the deprivation of life or personal liberty, save in accordance with law*. 'Law' wherever mentioned in Part II of the Constitution includes — by statutory direction — the common law of England (see art 160(2) read with s 66 of the Consolidated Interpretation Acts of 1948 and 1967). *It is now well settled that by the common law of England the right of access to justice is a basic or a constitutional right. See, Raymond v Honey [1983] 1 AC 1 , 13; R v Secretary of State for the Home Department, ex parte Leech [1993] All ER 539. In Thai Trading Co (a firm) v Taylor [1998] 3 All ER 65 at 69, Millett LJ described it as a fundamental human right. Thus, the common law right of access to justice is part of the 'law' to which art 5(1) refers. In other words, a law that seeks to deprive life or personal liberty (both concepts being understood in their widest sense) is unconstitutional if it prevents or limits access to the courts.*

The impugned part denies the applicants of their fundamental access to justice as enshrined in art 5(1) of the FC. As such, the impugned part is inconsistent with art 5(1) of the FC and is thus invalid to the extent of such an inconsistency as provided in art 4(1) of the FC.

[24] A third reason for invalidating the impugned part is based on the ultra vires doctrine as provided in s 23(1) of the IA. Section 23(1) of the IA provides as follows:

> 23(1) *Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.* (Emphasis added.)

Section 23(1) of the IA is in Part 1 of the IA and applies to the HDR by virtue of s 2(1)(e) of the IA because the HDR are made after 31 December 1968 under the HDA (which has been revised under the Revision of Laws Act 1968). The scope of s 23(1) of the IA has been explained by Mohd. Zawawi Salleh FCJ in the Federal Court in *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141; [2020] 1 CLJ 1 at para [81], as follows:

> [81] *It is trite that subsidiary or delegated legislation shall not be broader than the enabling legislation. This general principle of statutory interpretation is codified in s 23 [IA]* ... (Emphasis added.)

[25] The title to HDR has expressly stated that the first respondent has made HDR pursuant to s 24 of the HDA. I reproduce below s 24 HDA which confers statutory power on the first respondent to make HDR:

> 24 *Powers to make regulations.*
>
> (1) *Subject to this section, the Minister may make regulations for the purpose of carrying into effect the provisions of this Act.*
>
> (2) *In particular and without prejudice to the generality of the foregoing power, the regulations may —*
>
> (a) regulate the advertisements of a licensed housing developer;
>
> (b) regulate the use of names of housing estates developed by a licensed housing developer;
>
> (c) prescribe the form of contracts which shall be used by a licensed housing developer, his agent, nominee or purchaser both as a condition of the grant of a licence under this Act or otherwise;
>
> (d) regulate payments (under whatever name these may be described) which may be made by a purchaser either before, during or after the construction or completion of the house, flat or other accommodation for which that purchaser is required to make the payments, including the amount of the payments, the time when the payments become due and conditions that shall be fulfilled by a licensed housing developer before he may ask for the payments;
>
> (e) regulate and prohibit the conditions and terms of any contract between a licensed housing developer, his agent or nominee and his purchaser;
>
> (f) prescribe the fees which are payable under this Act;
>
> (g) prescribe that any act or omission in contravention of any of the regulations shall be an offence and provide for the penalties therefor either by way of fine or imprisonment or both: provided that any fine so provided shall not exceed fifty thousand ringgit and a term of imprisonment so provided shall not exceed five years, and in addition thereto may also provide for the cancellation and suspension of a licence issued under this Act;
>
> (h) prescribe the moneys which shall be paid into or withdrawn from the Housing Development Account and the conditions for such withdrawals;
>
> (i) prescribe offences which may be compounded and the forms to be used in and the method and the procedure for compounding such offences;
>
> (ia) provide for an exemption from the operation of this Act of such housing developer or housing accommodation as the Minister deems expedient and prescribe the form, limitations, restrictions or conditions of such exemption; and
>
> (j) provide for any matter which under this Act is required or permitted to be prescribed or which is necessary or expedient to be prescribed to give effect to this Act. (Emphasis added.)

Sections 24(1) and (2)(a)–(j) of the HDA do not expressly empower the first respondent to make a subsidiary legislation which ousts the court's jurisdiction to decide any decision of the first respondent. I am also unable to find that by necessary implication, s 24(1) and (2)(a)–(j) of the HDA enable the first respondent to make the impugned part. Furthermore, I am of the view that in providing for s 24(1) and (2)(a)–(j) of the HDA, it is inconceivable for Parliament to have intended for the first respondent to make delegated legislation which encroaches into the court's judicial power enshrined in art 121(1) of the FC. Accordingly, both literal and purposive interpretations of s 24(1) and (2)(a)–(j) of the HDA do not enable the first respondent to make the impugned part in reg 12 of the HDR. As such, the impugned part is:

(a) ultra vires s 24(1) and (2)(a)–(j) of the HDA; and

(b) void under s 23(1) of the IA.

E. WHETHER *ANG MING LEE* HAS RETROSPECTIVE OR PROSPECTIVE EFFECT

[26] The third respondents' learned counsel has contended that the Federal Court's decision in *Ang Ming Lee* only applies prospectively. As such, according to the third respondents' learned counsel, *Ang Ming Lee* does not apply to these three applications (which have been filed before the delivery of the Federal Court's judgment in *Ang Ming Lee*).

[27] I am of the following view:

(a) generally, a written judgment has retrospective effect ('general rule'). The general rule is demonstrated in the following judgment of Lord Reid in the House of Lords in *Birmingham City Corporation v West Midland Baptist (Trust) Association (Incorporated)* [1969] 3 All ER 172 at p 180) regarding the interpretation of provisions in the then United Kingdom's Acquisition of Land (Assessment of Compensation) Act 1919):

> *We cannot say that the law was one thing yesterday but is to be something different tomorrow. If we decide that the rule as to the date of the notice to treat is wrong we must decide that it always has been wrong, and that would mean that in many completed transactions owners have received too little compensation. But that often happens when an existing decision is reversed.* (Emphasis added.)

(b) an exception to the general rule has been laid down in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311. In *Dato Yap Peng* at pp 320–321, Abdoolcader SCJ gave the following judgment in the 3–2 majority decision of the Supreme Court:

> *I would accordingly declare that s 418A is in violation of the provisions of article 121(1) and therefore unconstitutional and void under the provisions of art 4(1). The deputy submits that any such pronouncement will create chaos as the section*

in question has been resorted to and trials held in the High Court as a result. The section has indeed been implemented and convictions and acquittals secured as a result over a span of some eleven years in view of the decision in the Hongkong Bank case, and it will therefore be necessary in these circumstances to apply the doctrine of prospective overruling in this case.

...

At the conclusion of argument on March 19, 1987, the Court accordingly by a majority (Tun Mohamed Salleh Abas LP, and Tan Sri Hashim Yeop A Sani SCJ dissenting) declared s 418A to be unconstitutional and void as being an infringement of the provisions of art 121(1) and applied the doctrine of prospective overruling so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions or acquittals which had taken place under that section prior to the date of our judgment in this matter would remain undisturbed and not be affected, and the appeal was dismissed on this basis. (Emphasis added.)

In *Dato Yap Peng*, the majority decision of the Supreme Court gave prospective effect to its decision regarding the unconstitutionality of the then s 418A of the Criminal Procedure Code ('first exception'). The first exception was applied so as to ensure that convictions and acquittals prior to the Supreme Court's decision in *Dato Yap Peng* were not affected;

(c) there is a second exception to the general rule ('second exception'). According to the second exception, the court may decide in exceptional circumstances that its decision regarding:

(i) the validity or effect of a provision of written law; or

(ii) a certain position at common law (case law)

can only have prospective effect. In support of the second exception, I refer to the Federal Court's judgment delivered by Richard Malanjum CJ (Sabah and Sarawak) (as he then was) in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 5 AMR 497. In *Sinnaiyah & Sons Sdn Bhd* at paras [48]–[53], the Federal Court overruled earlier decisions of the Federal Court and held that an allegation of fraud, even if such an allegation concerns 'criminal fraud', need only be proven on a balance of probabilities and not beyond all reasonable doubt. The Federal Court has expressly applied the doctrine of prospective overruling in *Sinnaiyah & Sons Sdn Bhd* at para [54], as follows:

[54] *However, we should make it clear that this judgment only applies to this appeal and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims.* (Emphasis added.); and

(d) the first and second exceptions which form the doctrine of prospective overruling, can only apply in exceptional circumstances. In this regard, I

rely on the decision of a seven-member coram of the House of Lords in *Re Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd and others* [2005] 4 All ER 209 as follows:

(i) Lord Nicholls held as follows at para [40] (concurred by Lord Steyn at para [45], Lord Walker at para [161], and Baroness Hale at para [162]):

> [40] *Instances where this power has been used in courts elsewhere suggest there could be circumstances in this country where prospective overruling would be necessary to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law. There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive consequences for past transactions or happenings that this House would be compelled to depart from the normal principles relating to the retrospective and prospective effect of court decisions*. (Emphasis added); and

(ii) Lord Hope decided as follows at para [74] (concurred by Lord Walker at para [161], and Baroness Hale at para [162]):

> [74] *Where the future may lead us we cannot tell. So, like my noble and learned friend Lord Nicholls, I would not rule out the possibility that in a wholly exceptional case the interests of justice may require the House, in the context of a dispute about the state of the common law or even about the meaning or effect of a statute, to declare that its decision is not to operate retrospectively* ... (Emphasis added.); and

(iii) Lord Scott gave the following judgment at para [126]:

> [126] *Lord Nicholls has reviewed in depth the jurisprudential pros and cons of a prospective overruling and has concluded that, even where interpretation and application of a statute is the issue, the door should be kept open for the possibility of such a ruling in an exceptional case (see [39], above). I would respectfully agree with his comment about the wisdom of a 'never say never' approach but find myself unable to visualise circumstances in which it would be proper for a court, having reached a conclusion as to the correct meaning of a statute, to decline to apply to the case in hand the statute thus construed* ... (Emphasis added.)

[28] Tengku Maimun bt Tuan Mat CJ delivered the following judgment of the Federal Court in *Ang Ming Lee* at paras [19], [25], [26], [36], [40], [55], [56] and [60]:

> [19] *Leave to appeal was granted to the purchasers on the following questions of law*:
>
> (i) *whether the [Controller of Housing] has the power to waive or modify any provision in the Schedule H Contract of Sale as prescribed by the Minister under the [HDA]* ('Question 1');

A (ii) *whether s 24 [HDA] confers power on the Minister to make regulations for the purpose to delegate the power to waive or modify the Schedule H Contract of Sale to the [Controller]* ('Question 2');

...

B [25] *Section 24(2) [HDA] empowers the Minister to prescribe the statutory form of contract for the sale and purchase agreement between the developer and the purchasers and to regulate the terms and conditions of the contract of sale. Pursuant to sub-s 24(2) [HDA], the Minister promulgated [HDR] prescribing the statutory form for the contract of sale in Schedule H together with the conditions and terms of such contract.*

C [26] *Having prescribed the Statutory Form H and the terms and conditions for the contract of sale, the Minister by reg 11(3) [HDR] then empowers the Controller to waive or modify the conditions and terms of the contract of sale as prescribed in Schedule H. This begs the question whether by empowering the Controller to waive or modify the conditions and terms of the contract, the Minister has exceeded the scope of the authority*
D *conferred on him by the legislature? In other words, by empowering the Controller, through reg 11(3), has there been an act of sub-delegation by the Minister to the Controller which is ultra vires [HDA]?*

...

E [36] *By s 24(2)(e) [HDA], the Minister is empowered or given the discretion by Parliament to regulate and prohibit the terms and conditions of the contract of sale. As opined by the learned authors in De Smith's Judicial Review, a discretion conferred by statute is prima facie intended to be exercised by the authority on which the statute has conferred it and by no other authority, but the presumption may be rebutted, by any contrary indication found in the language, scope or object of the Act. In our view, having*
F *regard to the object and purpose of [HDA], the words 'to regulate and to prohibit' in sub-s 24(2)(e) should be given a strict construction, in the sense that the Minister is expected to apply his own mind to the matter and not to delegate that responsibility to the Controller.*

G ...

[40] *[HDA] being a social legislation designed to protect the house buyers, the interests of the purchasers shall be the paramount consideration against the developer. Parliament has entrusted the Minister to safeguard the interests of the purchasers and the Minister has prescribed the terms and conditions of the contract of sale as per Schedule H. We find*
H *no contrary indication in the language, scope or object of [HDA] that such duty to safeguard the interests of the purchasers may be delegated to some other authority.*

...

[55] Finally, on the third task. In the instant appeals, *the Schedule H contract of sale prescribed by [HDR] is to carry into effect the provisions of [HDA], which is to protect*
I *the interests of the purchasers. The [HDR] made by the Minister must thus achieve the object of protecting the interests of the purchasers and not the interests of the developers. And at the risk of repetition, the duty to protect the interests of the purchasers is entrusted to the Minister.*

[56] *By delegating the power, vide reg 11(3) to the Controller to waive or modify the*

prescribed terms and conditions of the sale of contract, it is now the Controller who has been entrusted to regulate the terms and conditions of the contract of sale. Further, by modifying the prescribed terms and conditions and by granting the developer the extension of time, the Controller has denied the purchasers' right to claim for LAD. This modification and the granting of extension of time to the developer, does not appear to us to protect or safeguard the purchasers but rather the developer and this militates the intention of Parliament.

...

[60] *On the above analysis, we hold that the Controller has no power to waive or modify any provision in the Schedule H contract of sale because s 24 [HDA] does not confer power on the Minister to make regulations for the purpose of delegating the power to waive or modify the Schedule H contract of sale to the Controller. And it is not open to us to read into the section an implied power enabling the Minister to do so. We consequently hold that reg 11(3) [HDR], conferring power on the Controller to waive and modify the terms and conditions of the contract of sale is ultra vires [HDA].* (Emphasis added.)

[29] I am not able to accept the third respondent's submission that the judgment in *Ang Ming Lee* can only have prospective effect. My reasons are as follows:

(a) the Federal Court in *Ang Ming Lee* has not expressly ruled that its decision can only have prospective effect. Hence, in accordance with the general rule, the judgment in *Ang Ming Lee* has retrospective effect and applies to these three applications; and

(b) there are no exceptional circumstances for the doctrine of prospective overruling to apply to the decision in *Ang Ming Lee*. On the contrary, as held in many cases (including *Ang Ming Lee*), the object of HDA and HDR is to protect a 'homebuyer' (as defined in s 16A of the HDA). Accordingly, in line with the purpose of HDA and HDR, it is in the interest of homebuyers for the judgment in *Ang Ming Lee* to be given retrospective effect.

F. WHETHER THE SECOND RESPONDENT CAN EXTEND 36 MONTHS PERIOD

[30] As a matter of stare decisis, the Federal Court's judgment in *Ang Ming Lee* is binding on me. Premised on *Ang Ming Lee*, reg 11(3) of the HDR is invalid and the second respondent cannot therefore exercise any power under reg 11(3) of the HDR to extend the 36 months period (prescribed in Schedule H) to:

(a) 42 months period ('second respondent's first extension'); and

(b) 54 months period ('second respondent's second extension').

[31] In addition to *Ang Ming Lee,* there is another reason to invalidate the second respondent's first and second extensions. I am of the view that reg 11(3) of the HDR (the basis for the second respondent's first and second extensions) cannot be an exception to the SPA prescribed in reg 11(1) of the HDR (Statutory SPA). I reproduce below reg 11(1), (1A), (1B) and (3) of the HDR:

> 11 *Contract of sale.*
>
> (1) *Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule H.*
>
> (1A) *Notwithstanding paragraph (1), every contract of sale for build then sell for a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule I and where the contract of sale for build then sell is for the sale and purchase of a housing accommodation in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule J*;
>
> (1B) *Subregulations (1) and (1A) shall not apply if at the time of the execution of the contract of sale, the certificate of completion and compliance for the housing accommodation has been issued and a certified true copy of which has been forwarded to the purchaser*.
>
> ...
>
> (3) *Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions:*
>
> *Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the Controller*. (Emphasis added.)

Firstly, reg 11(1) of the HDR which prescribes for the Statutory SPA is a mandatory provision. This is clear from the use of the mandatory term 'shall' in reg 11(1) of the HDR — please see *Sri Damansara Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Ors* [2020] MLJU 170 at para [22]. There are only two exceptions to reg 11(1) of the HDR, namely reg 1(1A) (*Notwithstanding para (1)*) and 11(1B) of the HDR (*Subregulations (1) … shall not apply*). There is nothing in reg 11(3) of the HDR which provides that the reg 11(3) of the HDR shall override the Statutory SPA as prescribed mandatorily by reg 11(1) of the HDR. Accordingly, the second respondent cannot invoke reg 11(3) of the HDR to 'waive or modify' the 36 months period in the Statutory SPA.

[32] The second respondent's first extension was given before the signing of

the SPA's in these three applications. The second respondent's second extension was however granted after the conclusion of the SPA's in these three applications. Hence, there is an additional ground to invalidate the second respondent's second extension — the second respondent should have given all purchasers of parcels in the building (not only the applicants) a right to be heard before deciding on the second respondent's second extension. This was the basis of the Court of Appeal's judgment delivered by Harmindar Singh JCA in *Ang Ming Lee* at paras [24] and [25], as follows:

> *Whether The Purchasers Were Entitled To A Right To Be Heard*
>
> [24] *The final issue raised before us in arguments was whether the purchasers ought to have been given a right of hearing prior to the decision made by the Controller and/or Minister. In this respect, we note that the purpose of the Act was to protect the interest of the purchasers. As the rights of the purchasers to claim damages in the event of delay would be adversely affected or even extinguished, we agree that the purchasers must be given an opportunity to be heard prior to any decision made*.
>
> [25] *As the purchasers comprise a group which can easily be ascertained, they should at least be notified of the developer's application for any extension of time to complete the project and be given a reasonable period of time to state their views before any such decision is taken. As no such right to be heard was afforded to the purchasers, it is our judgment that the decision made in this case, whether by the Controller or Minister, was null and void and of no effect and should accordingly be set aside*. (Emphasis added.)

[33] The issue regarding the legality of the second respondent's first extension was raised by the court and not by the applicants or respondents. Having said that, the question of illegality can be raised at any time. It is decided in *Sri Damansara* at para [20], as follows:

> [20] *It is to be emphasised that even if parties and their learned counsel do not allude to any illegality, the court is duty bound to take cognizance of an illegality. It is contrary to public policy for the court to allow an illegality to be perpetrated. In Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd [1989] 1 MLJ 457, at 460–462, the breach of s 5(1) HDA was only raised for the very first time during the hearing of the appeal before the Privy Council. Despite the fact that the illegality issue had not been pleaded and raised in the High Court and the then Federal Court, the Privy Council in a judgment delivered by Lord Oliver, allowed such a question to be raised. The Privy Council then remitted the illegality issue to be considered by our Supreme Court (at the time of the decision of the Privy Council, appeals to the Privy Council for civil matters had been abolished and our Supreme Court had already been inaugurated as the apex court). Needless to say, learned counsel are duty bound as officers of the court to administer justice and to draw the attention of the court to any issue of illegality at the earliest opportunity.*

G. IS THE FIRST RESPONDENT'S DECISION VALID?

[34] I am not able to find any previous Malaysian case which has decided on the validity of the first respondent's decision to extend a time period provided in a Statutory SPA.

[35] I am of the view that the first respondent has no power under HDR to extend the 36 months period. This decision is premised on the following reasons:

(1) as explained in the above para 31, reg 11(1) of the HDR (which prescribes for the Statutory SPA) is only subject to reg 11(1A) and (1B) of the HDR. There is nothing in HDR which empowers the first respondent to extend the 36 months period in the Statutory SPA. Accordingly, there is no lawful basis to make the first respondent's decision and the first respondent's decision constitutes an illegality ('illegality'); and

(2) even if it is assumed that the first respondent has power under HDR to extend the 36 months period, in accordance with the Court of Appeal's decision in *Ang Ming Lee*, the first respondent should have given all purchasers of parcels in the building (not only the applicants) a right to be heard before making the first respondent's decision. Hence, there was procedural impropriety when the first respondent's decision was made ('procedural impropriety').

[36] It is trite law that the court has a discretionary power to issue an order of certiorari to quash a decision of a public authority if, among others, the decision is illegal or involves a procedural impropriety — please see the Federal Court's judgment delivered by Raus Sharif FCJ (as he then was) in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629, at [15]. In view of the illegality and Ppcedural impropriety (please see the above sub-paras 35(1) and (2)), I have no hesitation to exercise my discretion to issue a certiorari order to quash the first respondent's decision.

H. WHETHER THE THIRD RESPONDENT CAN RELY ON S 2(2) OF THE HDA

[37] The third respondent's learned counsel has submitted that if the court quashes the first respondent's decision, the court should remit the question of extending the 36 months period to the first respondent under s 2(2) of the HAD ('remittance order'). Section 2(2) of the HDA provides as follows:

> 2(2) *The Minister may by order published in the Gazette exempt any housing developer or housing accommodation from any or all of the provisions of this Act and such exemption may be granted for such duration as may be specified in the order, and may be*

made subject to such limitations, restrictions or conditions as the Minister may specify in the order. (Emphasis added.)

[38] I am not able to make the remittance order due to the following reasons:

(a) the learned senior federal counsel (SFC) (who represented the first respondent in these three applications) did not make any application for the remittance order. Such a course of action by the learned SFC, in my view, is proper and highly commendable; and

(b) the remittance order is in effect a court order of mandamus to compel the first respondent to consider exercising the first respondent's powers under s 2(2) of the HDA. The court may issue a mandamus order if the conditions as specified in provisos (a)–(e) of s 44(1) of the SRA are fulfilled cumulatively — please see the judgment of Abdul Hamid Mohamad CJ in the Federal Court case of *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641 at para [13]. Section 44(1) SRA provides as follows:

> 44 *Power to order public servants and others to do certain specific acts*
>
> (1) *A Judge may make an order requiring any specific act to be done* or forborne, *by any person holding a public office, whether of a permanent* or a temporary *nature*, or by any corporation or any court subordinate to the High Court:
>
> *Provided that —*
>
> (c) *an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act*;
>
> (d) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;
>
> (e) *in the opinion of the Judge the doing or forbearing is consonant to right and justice*;
>
> (f) the applicant has no other specific and adequate legal remedy; *and*
>
> (g) the remedy given by the order applied for will be complete. (Emphasis added.)

This court cannot issue a mandamus order in these three applications because the following two conditions of s 44(1) of the SRA are not fulfilled -

(a) proviso (a) to s 44(1) of the SRA is not satisfied as no application for the remittance order has been made by a person 'whose property, franchise, or personal right would be injured by the ... doing, as the case may be, of the said specific act'; and

(b) the remittance order is not consonant to 'right and justice' as

A required by proviso (c) to s 44(1)
proviso (a) to s 44(1) of the SRA is not satisfied as no application for the remittance order has been made by a person 'whose property, franchise, or personal right would be injured by the ... doing, as the case may be, of the said specific act'; and

B (c) SRA. This is because if the court has granted the remittance order, this will defeat the applicants' rights under the Statutory SPA (regarding the 36 months period) which has been prescribed mandatorily by reg 11(1) of the HDR.

C I. CAN THE APPLICANTS CLAIM FOR LAD BASED ON 36 MONTHS PERIOD?

[39] As explained in Parts F and G above, neither the first respondent nor the D second respondent has power under HDR to extend the 36 months period.

[40] It is not disputed that the High Court has a wide discretionary power to grant a declaration under s 41 of the SRA and O 15 r 16 of the Rules of Court 2012 ('the RC').

E

[41] I exercise my discretion under s 41 of the SRA and O 15 r 16 of the RC to grant a declaration that the applicants are entitled to claim LAD based on the 36 months period. The reasons for the exercise of this discretion are as follows:

F (a) by reason of reg 11(1) of the HDR, the 36 month period has been prescribed mandatorily in the Statutory SPA. If the applicants are not entitled to claim LAD premised on the 36 months period, the mandatory effect of reg 11(1) of the HDR will be circumvented; and

G (b) the object of HDA and HDR is to protect homebuyers. One manner to achieve this object is to ensure that the terms and conditions of the SPA are not drafted in a lopsided manner which favours unjustly housing developers (at the expense of homebuyers). Hence, the Statutory SPA is provided in reg 11(1) of the HDR. If the above declaration is not granted, H the above object of HDA and HDR will be defeated.

J. VALIDITY OF REMAINING PART OF REG 12 OF THE HDR

[42] I should clarify that other than the impugned part, the remaining part I of reg 12 (which provides for a right to appeal to the first respondent against the second respondent's decision under regs 3(3), 4(1), 5(4) and 9(2) HDR) is still valid and enforceable.

K. SUMMARY OF THE COURT'S DECISION

[43] In brief:

(a) the impugned part of reg 12 of the HDR is invalid:

(i) under art 4(1) of the FC because:

(1) the impugned part has ousted the court's judicial power under art 121(1) of the FC to review the legality of the first respondent's decision and has thereby altered the basic structure of FC (which includes the doctrine of separation of powers); and

(2) the impugned part deprives the applicants of their fundamental access to justice as provided in art 5(1) of the FC; and

(ii) pursuant to s 23(1) of the IA because the impugned part is ultra vires s 24(1) and (2)(a)–(j) of the HDA;

(b) in view of the invalidity of the impugned part, the court has judicial power under article 121(1) of the FC to decide these three applications;

(c) the judgment in *Ang Ming Lee* has retrospective effect and applies to the three applications;

(d) the second respondent cannot extend the 36 months period because:

(i) as decided in *Ang Ming Lee*, reg 11(3) of the HDR is invalid and the second respondent cannot therefore exercise any power under reg 11(3) of the HDR to extend the 36 months period;

(ii) reg 11(1) HDR is only subject to reg 11(1A) and (1B) of the HDR. Hence, the second respondent has no power under reg 11(3) of the HDR to extend the 36 months period as prescribed mandatorily by reg 11(1) of the HDR; and

(iii) all purchasers of parcels in the building (including the applicants) had been deprived of their right to be heard before the making of the second respondent's decision;

(e) the first respondent's decision is invalid because:

(i) the first respondent has no power under HDR to extend the 36 months period as provided mandatorily in reg 11(1) of the HDR; and

A (ii) the first respondent has deprived all purchasers of parcels in the building (including the applicants) of their right to be heard before the first respondent's decision is made;

B (f) the court cannot issue a mandamus order and make the remittance order because provisos (a) and (c) of s 44(1) of the SRA are not fulfilled; and

(g) by virtue of the Statutory SPA as prescribed mandatorily in reg 11(1) of the HDR, the applicants entitled to claim LAD from the third respondent based
C on the 36 months period.

[44] Premised on the above reasons, the following orders are made by this court, among others:

(a) an order of certiorari is granted to quash the first respondent's decision;
D
(b) the following declarations are given:

(i) reg 11(3) of the HDR is invalid;

(ii) the impugned part of reg 12 of the HDR is invalid;
E
(iii) the third respondent shall be bound by the 36 months period as provided in Schedule H; and

(iv) applicants can claim LAD based on the 36 months period; and

F (c) two sets of costs of the three applications shall be paid to the applicants by:

(i) the first and second respondents; and

(ii) the third respondent.

G **[45]** I must record my gratitude to all learned counsel in these three applications for their able submission.

[46] In closing, the court should give effect to the object of HDA and HDR
H which is to protect the interest of homebuyers in the Statutory SPA's.

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh

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